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NZLR 4-347

Butterworths 373

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

IN THE MATTER of the Family Protection Act 1955 (A No 315/77)

AND

IN THE MATTER of the estate of RAYMOND PAUL OLDS

BETWEEN JONATHAN PAUL SIMON OLDS

Plaintiff

AND THE PUBLIC TRUSTEE

Defendant

IN THE MATTER of the Law Reform (Testamentary Promises) Act 1949 (A No 413/83)

BETWEEN JEANNE MARGARET OLDS

Plaintiff

AND THE PUBLIC TRUSTEE

Defendant

Hearing: 27 October and 10 November 1983

Counsel: Family Protection Act proceedings :-
G L Turkington for Plaintiff
R A Da Vanzo for Public Trustee
J W Gendall for Elisabeth Olds
B R Boon for Miriam Olds

Law Reform (Testamentary Promises) Act action:-
Helen Croft for Jeanne Olds
R A Da Vanzo for Public Trustee

Judgment: 2/4/84

JUDGMENT OF EICHELBAUM J

There are before me two separate proceedings against the same estate and involving the same parties. It is convenient to deal with them together.

In order to set out the facts in a chronological way, it is necessary to start with Elisabeth Olds. She met the deceased, Raymond Paul Olds, in 1959. They commenced to live in a de facto relationship in 1961. About that time they purchased a property in Grafton Road, now the principal asset in the estate. Elisabeth (it will be convenient to refer to the parties by their first names) applied all her savings to the purchase of the house, title to which was taken in her name. The outgoings and expenses were shared, although as Elisabeth was in full-time employment, while Paul was working part-time only, her contributions were probably the greater. In 1963 they had a daughter, Miriam. In various ways Elisabeth continued to meet at least her share of expenses.

In 1967 Elisabeth and Paul parted company. She said that their relationship had become strained. She obtained a study grant to do research at a West German University. They parted by agreement, and clearly remained on good terms. Elisabeth continued to maintain Miriam, in conditions of some hardship as she did not receive any support from Paul for some years.

In 1974 Elisabeth returned to New Zealand with Miriam. In the meantime Paul had formed a relationship with Jeanne. However, Elisabeth and Paul continued to have contact, and in fact it seems that he suggested that they should marry, and live together

in Grafton Road with Jeanne in a menage a trois. At this time he made a payment of $6,000 in respect of maintenance for Miriam. For the next two years Paul also made some periodical payments. During this period Elisabeth transferred the Grafton Road house to Paul. She deposed that she did not receive any independent legal advice but Paul assured her that he had made proper provision in his will for her and their daughter. The will, which had been made in 1965, left the whole estate to Elisabeth with gift over to Miriam should Elisabeth predecease him. In sending her a copy of the will, he wrote :

" I do want you to have this copy of my will - which will remain unchanged - as an act of faith for ~~the greater part~~ all of this year and into/some of next year. Should it be necessary to use this in the event of my death would you please see that Jeanne may benefit too, but how and to what extent must be left for you to decide. You know my feelings for her and Aaron.

I hope you are able to forgive the rather belated offer of mine to marry me and the strange implications it could mean but the offer still stands. "

The alteration and interlineation shown above are as they appeared in the letter. They indicate that the deceased had some difficulty in determining how, on a long term basis, he should frame his testamentary dispositions.

Elisabeth returned to Europe with Miriam but maintained contact with Paul until his death. He visited Europe and stayed with them in 1975. I need not deal in detail with Elisabeth's life following Paul's death but can summarise by saying that she has had the satisfaction, after a good deal of difficulty, of seeing Miriam achieve a position where she is well advanced with her studies, and self-supporting.

Elisabeth made other contributions to Paul's position in addition to those already stated. In 1976 she paid off a a mortgage of $1,500 on the Grafton Road property. She said she did this because Jeanne was unable to meet the instalments. Elisabeth also provided $4,800 which was used to pay for renovations on a cottage at Otira which forms an asset in the estate. Clearly the relationship that subsisted between Paul and these two women, both of whom adopted his name although neither became married to him, was an unusual one.

Elisabeth's present circumstances are reasonable but modest. She has continued to work in Germany but intends to return to New Zealand. Her only assets are a small house at Plimmerton, which is rented in order to meet outgoings, and a 1972 car. She is still paying off the amount that she borrowed in order to assist the renovation of the Otira property.

I turn to Jeanne. She lived with Paul for approximately nine years until his death in June 1976. Jonathan was born four months before his father's death. She has continued to live with Jonathan in the Grafton Road house to which reference has already been made. The house needs urgent maintenance but she is not in a position to afford this. Her only income is from the domestic purposes benefit. She has the use of the mini car belonging to the estate. The Public Trustee as executor has met most of the outgoings in respect of the property. She has a substantial debt to the Public Trustee in respect of rent. She has deposed that any money she may recover in this litigation will go to pay those arrears.

During the deceased's lifetime Jeanne became aware of the terms of Paul's will. He told her that despite the will he had requested Elisabeth to make sure that she was looked after.

Subject to Jeanne being successful in these proceedings, she has made tenative arrangements to purchase the Grafton Road house. Such arrangements include a loan to enable her to have the maintenance work carried out. Jeanne is now aged 40. She says that this scheme affords the only opportunity she will have in the foreseeable future to provide a permanent home for Jonathan and herself. She has deposed that both she and the child are in good health.

I have mentioned the principal assets in the estate. The total value is stated to be $35,000. Out of this sum there will have to come the quite substantial costs that have necessarily been incurred in the Court proceedings. These were first commenced

in 1977, in the form of an application under the Family Protection Act on behalf of Jonathan. After the proceedings were launched, the parties evidently concentrated their efforts on reaching some agreement which would make allowance for both families. Clearly this would have been in accordance with the deceased's wishes. Eventually the parties reached an overall settlement, subject only to the approval of this Court to the extent that this was required. From the background recited it will be obvious that there are a number of potential causes of action. It has been entirely sensible for the parties to roll these all up in a blanket form of compromise. Further, taking a broad view of the justice of the situation, I think one cannot quarrel with a form of settlement which divides this modest estate equally between the two "families". Were it not for the complication that Jonathan is an infant, the intervention of the Court would not be required at all. However, that aspect has raised some problems of procedure and jurisdiction. They led to the issue of further proceedings, under the Law Reform (Testamentary Promises) Act 1949. Being persuaded that there had been no "final distribution" of the assets, as that term was explained in Sullivan v Brett 1981 2 NZLR 202, with consent of all parties I made an order under s 6 of the Act extending the time for commencement of the action. Recently the parties have filed a further Memorandum of counsel in which they detail the orders sought by all parties in both proceedings.

The orders that I would have to make, if such are to be consistent with the proposals that the parties have agreed upon, require separate orders in the two proceedings. However, in the circumstances it would be unrealistic not to consider the overall effect of any orders of the Court. Normally, as a matter of

logic, I think it would be proper to deal with the testamentary promises claim first.

So far as the Family Protection Act is concerned, in this situation I am mindful that the Court is not concerned to approve or disapprove of the terms of a private settlement, see Re Julso 1975 2 NZLR 536. The Court's only concern in the present matter is to see that the interests of the infant plaintiff Jonathan are properly protected. After hearing counsel however I have reached the conclusion that it would be proper to make orders in the terms which all counsel joined in seeking. The broad effect of these is first that the costs of all parties are to be paid out of the estate, in the amounts that will be recorded later. In the action under the Law Reform (Testamentary Promises) Act, judgment is to be given in favour of Jeanne for one quarter of the net estate remaining after payment of the costs. Then, in the Family Protection Act proceedings Jonathan is to receive one third of the net estate remaining. The effective result is that after payment of costs, Jeanne and Jonathan each receive one quarter of the net estate and the remaining one half goes to Elisabeth.

In considering the quantum of the award in favour of Jonathan I have to bear in mind the strength of the competing claims by Elisabeth and Miriam. On the authority of Re Sutton 1980 2 NZLR 50 I am entitled to have regard to Elisabeth's position notwithstanding that as it is founded on a de facto relationship only, she would have no direct claim under the Family Protection Act herself. Further, it is clear that Miriam (who is of full age) has a

proper claim, but her position - a very commendable one if I may say so - is that she is prepared to relinquish any claim in her own right if the result is that her mother will receive one half of the net estate. As mentioned Miriam is now self supporting, but she has not completed her studies. If a claim in her own right required consideration, in my judgment undoubtedly she would establish one, although in regard to quantum her claim would be a significantly less strong one than in the case of Jonathan, the bulk of whose education still lies in the future. Elisabeth has a strong moral claim to consideration because of the financial assistance she gave to the deceased in the past, and the extent to which she has borne the brunt of the upbringing and upkeep of Miriam.

On a strict analysis, the award to Jeanne on the testamentary promises claim leaves three quarters of the estate available to satisfy the claims of those persons entitled to consideration under the Family Protection Act, namely Jonathan, Elisabeth and Miriam. Unfortunately it is one of those situations where the estate is insufficient to do full justice to all the claims on it. Obviously, in the absence of competing interests, Jonathan would have a strong claim to the whole estate. I have hesitated over the size of the award that should be made in his favour. In the circumstances I am satisfied that the ultimate result, namely equal division between the two families, is a just one. It is an approach that receives support from what the Court of Appeal regarded as proper in Re Sutton. Further, Jonathan will obtain indirect but significant benefit from that aspect of the arrangement which will enable his

mother to purchase and repair the Grafton Road house. Finally, while the jurisdiction is one that the Court must exercise on its own responsibility, I think I am entitled to give weight to the fact that counsel for Jonathan strongly supported the making of an award in these terms. The settlement was negotiated while the infant had the advantage of being represented by counsel of considerable experience in family litigation. I have no doubt that he took into account the welfare of the infant plaintiff from a broader viewpoint than just the monetary value of the proposed award.

Accordingly I make the following formal orders :

In the Law Reform (Testamentary Promises) Act action

By consent -

1. Judgment for the plaintiff for a sum equal to one-quarter of the net estate remaining after satisfaction of all the orders for costs, that is the orders in both sets of proceedings.

2. Costs to the plaintiff, $1320 for costs together with $110.10 for disbursements.

In the Family Protection Act proceedings

1. Orders for costs as follows -
   (a) Plaintiff, $1770 for costs together with $126.20 for disbursements.
   (b) Elisabeth, $1,320 for costs together with $59.20 for disbursements.

(c) Miriam, $300 for costs together with $15 for disbursements.

2. An order that by way of provision for the proper maintenance and support of Jonathan he be paid one-third of the net balance of the estate remaining after satisfaction of (a) all the orders for costs, that is the orders both in this proceeding and in action A 413/83 (the action under the Law Reform Testamentary Promises Act 1949) and (b) the award in favour of Jeanne Margaret Olds in action A 413/83; such sum to be paid to a trustee or trustees to be nominated by counsel for Jonathan Paul Simon Olds upon trust for him until he attains the age of 20 years.

The deputy registrar has drawn my attention to the fact that through inadvertance, action A 413/83 was not set down. In accordance with the intentions of the parties I have treated the proceedings as if the subject of an order under R 250 B.

In case any further aspect requires attention, leave is reserved to any party to apply, in both proceedings.

Solicitors :
Young Swan Morison McKay (Wellington) for J.P.S. Olds
Office Solicitor, Public Trust Office (Wellington) for the Public Trustee
Buddle Findlay (Wellington) for Elisabeth Olds
Chapman Tripp (Wellington) for Miriam Olds
Luckie Hain Kennard & Sclater (Wellington) for Jeanne Olds